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November 12, 2004

EX PARTE – Via Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Level 3 Petition for Forbearance*, WC Docket No. 03-266

Dear Ms. Dortch:

Level 3 Communications LLC ("Level 3"), through counsel, files the attached comments in the docket captioned above. The comments present the views of several state public utility commissioners on the issue of state and federal jurisdiction over IP-enabled services. In particular, they explain the commissioners' position that "[t]he Commission should declare that IP-enabled services are interstate or 'mixed' for jurisdictional purposes and preempt state regulation of these services."

Susan P. Kennedy, Commissioner, California Public Utilities Commission, filed these comments in two other dockets: *IP-Enabled Services* (WC Docket No. 04-36) and *Vonage Petition for Declaratory Ruling* (WC Docket No. 03-211). Because the commissioners' comments bear directly on the jurisdictional issues in this docket, Level 3 submits them here as well.

Sincerely,

/s/

Charles D. Breckinridge

Attachment

PUBLIC UTILITIES COMMISSION
STATE OF CALIFORNIA
505 VAN NESS AVENUE
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SUSAN P. KENNEDY
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November 2, 2004

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

EX PARTE OR LATE FILED

RE: IP-Enabled Services, WC Docket No. 04-36; Vonage Petition for Declaratory Ruling, WC Docket No. 03-211

Dear Ms. Dortch:

The attached comments on the issue of State and Federal jurisdiction over IP-enabled services, in particular VoIP, represent those of the individual signatories to these comments and do not necessarily represent the positions of the public utility commissions on which the signatories serve.

If you have any questions regarding these comments, please do not hesitate to contact me.

Sincerely,

SUSAN P. KENNEDY
Commissioner

SPK/tjs

Attachment

THE COMMISSION SHOULD DECLARE THAT IP-ENABLED SERVICES ARE JURISDICTIONALLY INTERSTATE AND PREEMPT STATE REGULATION OF THESE SERVICES

The Commission should declare that IP-enabled services are interstate or "mixed" for jurisdictional purposes and preempt state regulation of these services.[1] The Commission should strive to issue this declaratory ruling as quickly as possible in order to promote a uniform regulatory environment in which IP-enabled and other advanced services may continue to thrive, and before any comprehensive reform of universal service programs or intercarrier compensation is considered.

The Commission maintains clear authority to preempt state regulation of IP-enabled service when "the matter to be regulated has both interstate and intrastate aspects," and when "preemption is necessary to protect a valid federal regulatory objective."[2] Both of these important elements are present with respect to IP-enabled services. IP-enabled services are inherently interstate or at a minimum jurisdictionally "mixed," a feature that should be encouraged, not hampered for the sake of maintaining some version of existing jurisdictional boundaries between State and Federal regulators. Federal preemption of IP-enabled services is also consistent with and necessary to promote a national policy repeatedly expressed by Congress to protect the Internet and emerging technologies from unnecessary regulation, and to encourage the deployment of advanced telecommunications services.

The FCC should move quickly to establish IP-enabled services, including VoIP, as an emerging technology that should remain free from unnecessary regulation *before* addressing intercarrier compensation and universal service reform for the following reasons:

- Protecting IP-enabled services including VoIP from being shoe-horned into current regulatory regimes will prevent the migration of outdated, unnecessary and burdensome rules to advanced services and emerging technologies.

- IP-enabled services and VoIP are the primary *cause* of destabilization in the intercarrier compensation (IC) regime and the revenue base for universal service (USF). Intercarrier compensation and universal service must adapt to an IP world, *not the other way around.*

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[1] This in no way suggests that the legitimate interests of states in issues such as e911, universal service, intercarrier compensation reform, access to consumers with disabilities, network reliability, service quality and consumer protection could not or should not be addressed. To the contrary, clearly establishing the domain in which the regulatory treatment of IP-enabled services will be determined will facilitate resolution of these issues in a more streamlined manner and with less incentive for costly and protracted litigation.

[2] Public Service Commission of Maryland v. FCC, 909 F.2d 1510, 1515 (DC Cir. 1990).

Federal preemption of IP-enabled services is consistent with and necessary to protect a well-established national policy of protecting emerging technologies from unnecessary regulation.

Since opening the first *Computer Inquiry*[3] into the interrelationship between data services and the telecommunications network in 1966, the FCC and Congress have repeatedly affirmed that innovation and new telecommunications technologies should be allowed to flourish in a largely unregulated environment. The FCC's early deregulatory efforts to facilitate the growth of data services using the public telecommunications network contributed directly to the explosive growth and development of the Internet.

As the integration of computer-based services and the telecommunications network developed and matured over three decades, Congress and the FCC continued to take numerous steps to "wall off" advanced services and new technologies from regulations applied to common carriers offering traditional voice services. In *Computer Inquiry II*, the FCC expanded the scope of telecommunications services that should remain protected from traditional regulation by creating a new category of services called "enhanced services." In that decision the FCC defined "enhanced services" as:

> Services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol, or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.[4]

In the Telecommunications Act of 1996, Congress furthered this national policy by directing the FCC to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." "Advanced telecommunications capability" is defined in Section 706 of the Act as:

> Without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.[5]

IP-enabled telecommunications service is the natural evolution of this long-standing federal policy designed to promote exactly this type of innovation in the telecommunications industry to benefit consumers.

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[3] FCC *Computer I Final Decision,* 28 F.C.C. 2d. 267.

[4] FCC, *Amendment of Section 64.702 of the Commission's Rules and Regulations*, Final Decision, 77 FCC 2d 384 (1980) (*Computer II*), *aff'd sub nom. Computer and Communications Industry Ass'n* v. *FCC*, 693 F.2d 198, 209-210 (D.C. Cir. 1982) (*CCIA*), *cert. denied*, 461 U.S. 938 (1983).

[5] 47 U.S.C. § 706(c)(1).

IP-enabled services, such as those offered by Vonage, provide a wealth of innovative services that fully integrate voice, data, video, interstate or international mobility, Web-based account management, "follow me" calling, fax capabilities, multimedia conferencing, "virtual" phone numbers, and "SoftPhone" features that allow a customer to turn any PC, laptop or PDA into a fully-functioning telephone, and other features being invented every day.

It is neither commercially feasible nor in the public interest to attempt to separate the "basic" intrastate voice function of IP-enabled services in order to permit State regulation of that portion of a bundled service package. In fact, it would be a *reversal* of long-standing national policy protecting new technologies from unnecessary regulation for the FCC *not* to preempt regulation of IP-enabled services by State Commissions.

The foundation of national telecommunications policies over the last four decades has been a conspicuous effort to promote innovation and progressively replace government regulation of the telecommunications industry with competitive market forces. The 1996 Act was explicit in its directive to the FCC and State Commissions in this regard:

> ... the Commission shall forebear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications services... if the Commission determines that – (1) enforcement of such regulation or provision is not necessary to ensure that the charges practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.[6]

Aside from clearly identifiable areas where regulation is required to protect consumers or ensure public safety, such as sustaining the emergency 911 networks, anti-fraud provisions, anti-trust provisions and access for law enforcement, the emphasis should be on *eliminating* anachronistic and unnecessary regulations, not *expanding* them to new technologies and services.

IP-enabled services are inherently interstate and the interstate nature of IP-enabled services should be encouraged, not hampered for the sole purpose of preserving a state role in regulation.

Many IP-enabled services, including VoIP, rely on the same dispersed networks that constitute the Internet. As the Commission itself has recognized, the Internet is "an international network of interconnected computers enabling millions of people to

[6] 47 U.S.C. 160.

communicate with one another and to access vast amounts of information from around the world."[7] Applications provided over the Internet are clearly jurisdictionally mixed, involving computers in multiple locations, often across state and national boundaries. There is no commercially feasible or practical way for providers of IP-enabled services, including VoIP, to separate the interstate aspects from the intrastate aspects of the services. Thus, IP-enabled services are inherently interstate or, at a minimum, "mixed" for jurisdictional purposes and subject to the exclusive jurisdiction of the FCC.

Even if it were technically feasible to reliably distinguish between the interstate and intrastate aspects of IP-enabled services, *it would not be in the public interest to do so*. Because VoIP virtually eliminates the relevance of time and distance in the cost and transmission of voice telephony, most VoIP providers are able to offer "unlimited local and long distance" calling for as low as $19.95 per month, and tout add-on international calling for as low as two or three cents a minute.[8] *These low rates are directly related to the bundled nature of the services offered.* Consistent with the long-standing national policy to "promote competition" and "secure lower prices,"[9] encouraging the continued growth of bundled IP-enabled services such as VoIP provides consumers with the widest range of options for voice telephony based on cost, quality and services to meet the customer's needs, and promotes competition among providers of telecommunications services using other platforms. Thus, in order to remain faithful to the mandates of federal law, IP-enabled services must be recognized as inherently interstate, or at the very least jurisdictionally mixed, and the FCC should continue to encourage the development of bundled VoIP services.

The regulatory treatment of IP-Enabled Services must be established immediately, *before* any plans to resolve intercarrier compensation and universal service are formed.

IP-enabled services are the future of telecommunications. The definition and regulatory treatment of VoIP and other IP-enabled services must be determined uniformly at the federal level and be recognized as an integral layer in the foundation of any plan to reform intercarrier compensation (ICC) and universal service funding (USF).

The argument by some regulators and policymakers that it would be premature for the FCC to make a determination on jurisdiction outside of comprehensive reform is backwards and self-defeating. VoIP is widely recognized as a disruptive technology that will dramatically hasten the demise of the ICC and USF funding base, and *the regulatory structure of intercarrier compensation and universal service must be changed to conform to an IP-based world, not the other way around.*

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[7] FCC, *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling,* GN Docket No. 00-15; *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities,* CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77, March 15, 2002.

[8] See Packet 8 "Freedom Unlimited" at www.packet8.net or International Rates at www.Vonage.com

[9] The Telecommunications Act of 1996, Preamble.

State regulators and policymakers are rightly concerned that allowing IP-enabled services to remain unincorporated in the regulatory regime of traditional telecommunications carriers with regard to access charges, universal service, 911 and other social obligations will create significant incentives for arbitrage. But the nature of IP technology makes it impossible on a practical level to eliminate arbitrage under the current ICC regime. Even if it were practical, it would not be so without applying significant regulatory limitations to VoIP and IP-enabled services in contravention of a clear federal policy of forbearance on new technologies and advanced services.

For example, one of the features of VoIP that customers find most attractive is mobility. VoIP customers can usually select an area code that bears no relationship to the customer's geographic location.[10] VoIP providers advertise this feature as an explicit means of avoiding "long distance" charges.[11] Most providers of VoIP services also market the fact that the service is portable – i.e., consumers can use it anywhere in the world, wherever they have access to a broadband connection. Even if a VoIP provider can know where its customer originated the call, it may not know the geographic location of the called party – since a phone number could be assigned to the customer of a local exchange carrier (LEC) or to another VoIP provider, in which case the area code dialed may not reflect the geographic location of the called party.

Companies cannot reliably determine the location of end users served by Internet Service Providers (ISPs) that backhaul their traffic to a single location, or end users served by corporate networks deploying proxy servers that function as gateways or hubs, or use security procedures and filters that obscure the location of the IP address. Some service providers use "dynamic IP addressing" for residential customers, in which case the IP address changes each time the user connects to the Internet.

Forcing companies to develop intricate systems and infrastructure for the purpose of trying to capture IP-enabled services under the current location-based ICC regime would be pointless, since it would simply prompt companies and users to develop new ways to circumvent the costs of any regulations. Clearly, as the Commission has itself recognized, requiring VoIP providers to develop these systems "for the purpose of adhering to a regulatory analysis that served another network would be forcing changes on th[ese] service[s] for the sake of regulation itself, rather than for any particular policy purpose.[12]

We agree that reform of ICC, USF and 911 issues must be completed quickly. Among the few areas of consensus in the telecommunications industry is that the current intercarrier compensation system is broken, that universal service funding is declining, and that IP-enabled services will rapidly accelerate the demise of both. Generally

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[10] See www.Vonage.com "Choose any area code we offer, worldwide."
[11] Id. "So Mom doesn't have to pay long distance charges when she calls you."
[12] *In the Matter of Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service,* WC Docket No. 03-45, Memorandum Opinion and Order, FCC 04-27, February 19, 2004, ¶ 21.

accepted industry estimates indicate that it costs roughly 15 times less to move a bit of information from one point to another over an IP network than it does to move the same bit of information across the PSTN.[13] That fact is the primary reason for the dramatic expansion of IP networks and services in North America, Europe and other parts of the world in the last few years. It is also the primary reason for destabilization in the intercarrier compensation regime and the decline in funding for universal service programs, since those programs are largely based on a percentage of rapidly declining costs. The California Public Utilities Commission has indicated that, by 2008, funding for universal service programs in California could decline by as much as 40% due to the migration of voice telephony to IP networks.[14]

The alarm expressed by regulators and policymakers by the rapid destabilization of revenues for universal service programs is valid, and the FCC must move quickly to examine the purpose and goals of both ICC and universal service, in close coordination with State Commissions, in order to redefine the need and adapt these programs and their funding mechanisms to an IP-based world. The definition and regulatory treatment of IP-enabled services must be determined uniformly at the federal level as a precursor to development of a comprehensive and sustainable plan for reforming ICC and universal service.

Federal preemption on VoIP does not preclude collaboration with States on key issues including public safety, consumer protection and reform of intercarrier compensation and universal service.

A declaratory ruling by the FCC that IP-enabled services, including VoIP, is subject to exclusive federal jurisdiction does not in any way preclude Federal-State collaboration on the many issues of concern to states, such as reform of intercarrier compensation and universal service, maintenance of 911/E-911 standards, network reliability, consumer protection and service quality issues. In fact, clearly establishing the domain in which the regulatory treatment of IP-enabled services will be determined will facilitate resolution of these issues in a more streamlined manner and with less incentive for costly and protracted litigation.

Several State Commissions have already attempted to make determinations as to types of IP-enabled services that constitute a "telecommunications service" or which companies offering IP-enabled services are "telecommunications carriers" subject to State regulation.[15] These determinations vary from state to state based on inconsistent interpretations of federal law or individual State statutes. In New York, for example, the PSC Order states that:

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[13] Telecom Regulation and Voice Over IP, Position Paper, Level (3) Communications, 2/15/04.

[14] CPUC Report to the California State Senate Committee on Energy, Telecommunications and Public Utilities, January 27, 2004.

[15] See New York State Public Service Commission, *Order Establishing Balanced Regulatory Framework for Vonage Holdings Corporation*, Case No. 03-C-1285; Minnesota Public Utilities Commission P-6212/C-03-108; California Public Utilities Commission, *Order Instituting Investigation* 04-02-007.

> Vonage owns and manages equipment (a media gateway server) that is used to connect Voyage's customer to the customers of other telephone corporations via their public networks, as necessary. This equipment constitutes a "telephone line" under the PSL and is used to facilitate the provisioning by Vonage of telephonic communication to customers. Accordingly, Vonage is a "telephone corporation" under our jurisdiction.[16]

In an Order opening an investigation to determine the regulatory treatment of VoIP providers, the California Public Utilities Commission broadly defined VoIP as a "public utility telecommunications service that delivers voice and other related services using Internet Protocol (IP) technology" and tentatively concluded:

> Viewing VoIP functionally from the end-user's perspective, and consistent with definitions in the Public Utilities Code, we tentatively conclude that those who provide VoIP services interconnected with the PSTN are public utilities offering a telephone service subject to our regulatory authority.[17]

The opportunity for variation among states in making determinations as to the definition of VoIP services, the regulatory status of service providers, and the application of federal and state statutes is limitless. Permitting states to make these individual determinations is an invitation to endless litigation and uncertainty. Attempts to regulate VoIP providers by State Commissions in Minnesota and New York have already been litigated and struck down by Federal Courts.[18]

In conclusion, absent a declaratory ruling by the FCC establishing exclusive jurisdiction, companies providing IP-enabled services will be subject to an effort by States to impose a patchwork of regulations, intrastate access charges, social obligations and taxes. In a regulatory environment of uncertainty regarding the jurisdiction of IP-enabled services, comprehensive reform of ICC and USF will be made much more difficult and costly. Disparate regulatory treatment on a state by state basis will lead to:

- A patchwork of different definitions and rules for similar types of telecommunications services on a state by state basis.
- Increased litigation over state determinations which will delay comprehensive regulatory reform at the federal level.
- A chilling effect on investment in new IP-based services.
- Exponentially increased opportunities for regulatory arbitrage based on which state regulatory treatment is more favorable to a carrier's interests.

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[16] New York PSC Order m, Case No. 03-C-1285.

[17] CPUC OII 04-02-007, 4.

[18] *Vonage Holdings Corporation, Plaintiff, v. The Minnesota Public Utilities Commission, and Leroy Koppendrayer, Gregory Scott, Phyllis Reha, and R. Marshall Johnson, in their official capacities as the commissioners of the Minnesota Public Utilities Commission and not as individuals, Defendant,* Civil No. 03-5287, U.S. District Court for Minnesota, 290 F Supp. 2d 993; *Vonage Holdings Corp. v. New York Public Service Commission, et.al.*(S.D. New York 2004) Civil No. 04-4306-DFE.

- Entrenchment by carriers and legislators who come to rely on a particular revenue stream or regulatory scheme established by a State Commission, making subsequent changes at the federal level more difficult.

The Commission should declare that IP-enabled services are interstate or "mixed" for jurisdictional purposes and preempt state regulation of these services. The Commission should strive to issue this declaratory ruling as quickly as possible in order to promote a uniform regulatory environment in which IP-enabled and other advanced services may continue to thrive.

* * * * *

These comments herein represent, collectively, those of the individual signatories to the comments and do not necessarily represent the positions of either the public utility commissions on which the signatories serve or the states in which the signatories serve.

Dated: November 2, 2004

Respectfully submitted,

GREGORY E. SOPKIN, CHAIRMAN
Colorado Public Utilities Commission

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